No. 13,494

IN THE

United States Court of Appeals

For the Ninth Circuit

ALASKA AIRLINES, INC., (a corporation),

Appellant,

vs.

ARTHUR W. STEPHENSON,

Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEE.

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is a appeal taken from a final judgment rendered on the 18th day of April, 1952, by the District Court for the Territory of Alaska, Third Division, in favor of the appellee (plaintiff in the lower court) and against the appellant.

The District Court for the Territory of Alaska is a court of general jurisdiction consisting of four Divisions, of which the Third Division is one. Juris-

diction of the District Court is conferred by Title 48 U.S. Code Section 101. See also Alaska Compiled Laws Annotated 1949, 53-2-1. Practice or procedure of the District Court, since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure which were extended to the courts of the Territory of Alaska on that date. 63 Stat. 445, 48 USCA 103 a.

Jurisdiction of this court to review the judgment of the District Court is conferred by new Title 28 USC Sections 1291 and 1294 and is governed by the Federal Rules of Civil Procedure.

Appellee takes no exception to the statement of appellant in its brief as to the pleadings in the case except that appellee calls the attention of the court to the fact that the appellee remained in the employment of the Alaska Airlines, Inc. as vice-president of the defendant corporation until dismissed, and at all times thereafter and up to the date of trial held himself ready, willing and able to perform the services of employment to the defendant corporation, all of which services of employment were refused by said corporation. (R 5.) The appellee further calls the attention of the court to the fact that the affirmative defenses interposed by the appellant at the close of the case were deemed denied. See instructions of the court, page 307 record.

II.

SUMMARY OF ARGUMENT.

The appellant has claimed that the District Court erred in the following respects in the first cause of action: 1. That the evidence is insufficient to establish a contract between the parties, written or oral. 2. That the alleged contract was within the statute of frauds and the defendant is not estopped to assert its invalidity upon that ground. 3. That the evidence establishes that the plaintiff had made no effort to mitigate damages and therefore any recovery for other than nominal damages was improper. 4. That the verdict is contrary to the law and the evidence. 5. That the trial court erred in denying defendant's motion for a directed verdict in favor of the defendant, as made at the close of the plaintiff's case and as renewed at the close of all evidence. 6. That the trial court erred in denying defendant's motion for a judgment notwithstanding the verdict.

Appellant further claims as to the appellee's second cause of action that the appellee failed to establish a contract with the appellant to reimburse him for installments paid in the purchase of real estate in Anchorage, Alaska, in the aggregate amount of $2,000.00.

For all practical purposes, errors urged by the appellant with the possible exception of the second point above referred to, are based upon the insufficiency of the evidence adduced by appellee in the court below. The law, as appellee submits, is well

established that the jury should be permitted to return a verdict according to its own view of the facts unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it the case is palpably for the party asking a peremptory instruction. See *Travelers Insurance Co. v. Ralph Randolph,* 78 Fed. 754, 759. Appellee believes that on the face of the record all of the points designated by appellant insofar as they touch the sufficiency of the evidence in the subject cause, and the questions here presented to the court in that regard, should be resolved in favor of the appellee for the reason that error is never presumed but must be positively shown. By the great weight of authority the court will not concern itself with sufficiency of the evidence unless all of the evidence before the lower court and jury is contained in the record. The sole purpose of review is to determine whether or not the appellant was fairly treated and the appellate court acts only upon a properly preserved and authenticated record. The duty to show error involves the necessary steps and the obligation to bring up more than a fragmentary record. (O'Brien's Manual of Federal Appellate Procedure, 1941, chapter 12, page 141.) A review of the designation of the contents of the record (R 338) discloses that such has not been done in this case by the appellant, upon whom the duty rests.

The appellee contends that the evidence, if the same in its entirety were before the court, would clearly show that the appellee was a skilled and highly desirable executive; that appellee had established himself

by long years of service with the Western Air Lines and had thereby created a seniority which inured to his benefit so long as he remained in the service of said company, and that regardless of whether appellee worked as a pilot or as an executive of said company, his future in the air carriers' industry was secured, and that with full knowledge of these facts, appellant, through its chairman of board of directors, induced and enticed the appellee to leave and depart from the services of the Western Air Lines to enter the employment of the appellant for a term and period of not less than two years at an agreed and stipulated salary, and that the appellee entered into performance of the contract in good faith and performed the said contract of services until such performance was made impossible by actions of the appellant, and that the appellee so changed his position and acted to his detriment in reliance on and in fulfillment of the oral contract of employment of appellant, that to distrub the final decision of the lower court would in fact be fraud in itself. Appellee believes that to disturb the judgment or verdict of the lower court would be to defeat the very purpose for which the statute of frauds was enacted and would in effect be using the statute of frauds as an engine of fraud.

Appellee contends that the jury, having all of the evidence before it, was properly instructed in regard to the existence or non-existence of an oral contract, (R 53-54) and that the jury having been so properly instructed, necessarily foreclosed the question as to the existence or non-existence of the contract of em-

ployment unless and until the appellant, with the entire evidence in record before this court, can establish to the contrary, and not having brought forward the full record, appellant is foreclosed of the right to argue sufficiency of the evidence. Appellee further calls attention of the court to the fact that the lower court made a specific finding on the judgment, as follows (R 74):

> "The Court expressly finds that the plaintiff Stephenson surrendered his employment with Western Air Lines and his seniority therein, for what the plaintiff then and thereafter believed to be a contract of employment of the plaintiff by the defendant for the period of at least two years at compensation of at least $1300.00 per month. The jury by its verdict on the plaintiff's first cause of action has necessarily determined that such a contract was made and rendered verdict on the first cause of action accordingly."

Appellee believes that the only substantial question presented by the appellant is the matter of the statute of frauds and in this respect submits that the action of the appellee pursuant to the terms of the agreement of employment, and in reliance thereon, changed his position to his detriment; and further that appellant, through its agent Marshall, stood by and remained silent at a time when duty commanded that he speak and that the appellant shall not be heard at this time for the reason that the doctrine of estoppel commands appellant to silence. The doctrine of estoppel as universally applied in the courts of law and equity of

the United States, removes the case from the operation of the statute of frauds.

The court properly denied appellant's motion for an instructed verdict and likewise properly denied appellant's motion for a judgment notwithstanding verdict and motion for new trial, and accordingly judgment of the District Court should be affirmed.

ARGUMENT.

Appellee believes that the facts necessary for the consideration of this court and pertinent to argument can be briefly stated as follows. Appellee Arthur W. Stephenson had at all times between May 5, 1928 and September 18, 1951, been either a pilot, director, vice-president or superintendent of commercial airlines. (R 119.) Appellee had first been associated with the National Park Airways as organizer and was with that company until it was sold to Western Air Lines, Inc. in 1937, and then stayed on as a divisional superintendent for Western Air Lines, Inc. at Salt Lake City. (R 120.) Appellee had from time to time been called away from his duties, either to return to active flying service in the United States Air Force or to aid and assist other corporations in obtaining certifications or reorganization and appellee acted in that capacity for Inland Airways and Seaport Air Lines and accordingly, as the record will show (R 110-120) from the period of 1928 through 1951, or for more than 20 years prior to his employment

with Alaska Airlines, had held positions of high responsibility and trust and had every expectancy, so far as the record shows, to continue in the employment with Western Air Lines until retirement.

It was in this happy position that the appellee found himself when on or about September 15, 1951, Alvin T. Adams, manager of an aviation consultant firm, apparently located in the City of New York (R 121) placed a telephone call and requested the appellee to consult with appellant's chairman of board of directors in regard to the affairs of the Alaska Airlines, Inc. Appellee was requested (R 121) to go immediately to Anchorage, Alaska, to take charge of the operations of Alaska Airlines, Inc. as a general manager. The record clearly shows (R 120 through 122) that the appellant sought out the appellee, offered him a proposition of employment pursuant to which appellee took the maximum period of leave from the Western Air Lines, and it was understood at the time of the initial meeting that the appellee would take charge for a period of from six weeks to three months and thereafter a long range agreement would be worked out. It was agreed at the initial meeting that the employment for at least two years at a salary of at least $1300.00 per month would continue regardless of the certificate sought by Alaska Airlines, Inc. (R 123-5.)

Appellee was bound under penalty of losing his status as a senior pilot with Western Airlines, Inc to return to the employment of Western Airlines, Inc.

on or before March 18, 1951, all of which was made known to Marshall, chairman of the board of directors for appellant. (R 129.) Appellee contends that even with the state of the record as it is, and without the entire record before the court showing partial performance by the appellee, and giving full force and effect to the evidence adduced by the appellee and in the most favorable light to the appellee, there can be but one conclusion, and that is that prior to March 18, 1951, appellant did in fact promise a contract and did induce the appellee to remain in the employment of the appellant to his irreparable damage. It is worthy of note that after March 18, 1951, appellant was still talking contract with appellee, if the testimony of R. W. Marshall is to be believed. (R 226.) If no agreement was ever made with Stephenson for a definite wage or period of time, why then would the parties still be discussing written contracts and tendering each to the other proposed written memoranda nearly a month after Marshall, as he testified, had advised appellee that they had no need for his services since he was duplicating Col. Bierds, who had now returned and was on the job functioning? (R 239.) (Plaintiff's Exhibit 17, R 263.)

If, as appellant contends, the employment was merely temporary, why then would Mr. R. W. Marshall testify in regard to the moving and moving expenses of Arthur W. Stephenson? (R 226.)

"Q. What were the terms of the employment —how much was he to receive?

A. He was to receive $1000.00 per month plus $300.00 per month for living expenses while he was in Anchorage before he moved, or, rather brought, his family to Anchorage."

Appellee believes that the points raised by appellant involving sufficiency of the evidence are not properly before the court for the reason that all of the evidence is not in the record, and further believes that the obligation to bring up the record lies upon appellant.

It is to be noted that under the designation of contents of record set forth as follows:

"Designation of Contents of Record.

Appellant desires the entire record printed in this case with the following exceptions:

1. Defendant's Exhibit 'A'.

2. None of the reporter's transcript with the exception of pages 5 through 108; pages 119 through 123; pages 135 through 147; pages 203 through 205; pages 316 through 426." (R 338.)

there is deleted pages 124 to 134 (R 211-213), pages 148 to 202 (R 223-224), and pages 205 to 315 (R 225-226) of the transcript, or a total of 175 pages of transcript of testimony. In addition, there has been deleted all of the exhibits of plaintiff and defendant save and except as to five listed in the index of the record as plaintiff's Nos. 1, 5, 15, 16 and 17.

By the great weight of authority, this court or any other appellate court cannot be requested to search the transcript in order to establish evidence not prop-

erly preserved in the record. While it is conceivable that the appellant might urge this court that he has selected all of the pertinent evidence bearing upon point 2 (R 338) of his specification of errors, it is almost inconceivable that the appellant could urge this court with any weight of authority to the effect that his selections of excerpts from the record were proper selections for this court to fairly meet and decide the question of the sufficiency of the evidence of the plaintiff's case in the lower court to entitle the matter to go to the jury.

The matter has been decided in practically all state courts so far as the plaintiff has been able to determine, that a moving party is precluded from challenging the sufficiency of the evidence unless all of the evidence is included in the record on appeal. In this regard the court's attention is called to *Bracken v. Bracken,* decided in the supreme court of South Dakota December 21, 1927, cited at 217 N.W. page 192, wherein the court was considering a matter arising out of a divorce action and a subsequent proceeding for partition of lands and a general accounting between the parties. The court stated as follows:

> "Practically all the assignments of error are based upon the insufficiency of the evidence to support the findings of the court and its conclusions of law. Respondent points out that the abstract of the evidence is not complete, because the evidence taken in the former trial is not included. The transcript of the evidence of the former trial was introduced in evidence, but

appellant says such evidence is immaterial upon any of the issues now before the court, and it was not necessary to include such evidence in the brief, and contends that the abstract is complete and sufficient and contains all the material evidence to properly present the questions raised on this appeal. If the omitted evidence is material, then this court will not consider the assignments based on insufficiency of the evidence, but will presume the findings have support in the evidence. The former relations of the parties cannot be considered as giving the woman any rights incident to marriage or any rights in lieu of marital rights, nor can equity consider the woman as a wife for the purpose of compensating her for wifely duties performed, but the assumed relationship may have a very material effect upon contracts between the parties. If a woman should assume the duties of a housewife and care for a home, while the man assumed the duties of a husband and ran the farm, although both parties knew there was no marriage, such assumed relation might have a great bearing in determining the right to wages of one against the other, or upon the interest of each in the property acquired in the joint enterprise. What the respective rights may be in such case need not be decided, but that the rights of the parties and interest in the acquired property would differ in such case, from the rights and interests of parties not engaged in a joint undertaking, cannot be doubted."

The District Court of Appeal, Third District of California, (1952) in deciding the case of *Whalen v.*

Ruiz, et al., cited at 242 Pac. (2d) 78, came to the same conclusion, citing 2 Cal. Jur. at page 697:

> "The appellate court will not consider the question of the sufficiency of the evidence unless all of the evidence is included in the record on appeal."

On the face of the record, it is clear that not all of the record has been brought forward, nor have the exhibits pertinent thereto been included therein. Appellee contends that the rule is properly laid down by the Circuit Court of Appeals, Eighth Circuit in *Nolan v. United States,* cited at 75 Fed. (2d) 65, where the court stated as follows:

> "The rules of law which are here governing are well established. They state the basic principles of judicial review in law cases. The first is that the sole purpose and function of such review is to determine whether the appellant has been denied a fair trial (which is his right) through prejudicial error committed in connection with the proceedings in the trial court. Stokes v. United States, 264 F. 18, 24 (C.C.A. 9). The second is that such error will not be presumed, but must be affirmatively and clearly established by appellant. Mercantile Trust Co. v. Hensey, 205 U.S. 298, 306, 27 S. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572; Loring v. Frue, 104 U.S. 223, 224, 26 L. Ed. 713; Kearney v. Denn, 15 Wall. 51, 56, 21 L. Ed. 41; Miller v. United States, 11 Wall. 268, 299, 300, 20 L. Ed. 135; Rector v. United States, 20 F. (2d) 845, 859 (C.C.A. 8); Bankers' Trust Co. v. M., K. & T. Ry. Co., 251 F. 789, 798 (C.C.A. 8). The third

is that the appellate court can and does act only upon the record (properly preserved and authenticated) of what took place in the trial court in determining whether the error claimed is present. Bechtel v. United States, 101 U.S. 597, 600, 26 L. Ed. 1019; Kearney v. Denn, 15 Wall. 51, 56, 21 L. Ed. 41; Cohens v. Virginia, 6 Wheat. 264, 409, 410, 5 L. Ed. 257.

In such determination from the record, it is obvious that the appellate court cannot determine whether the claimed error exists, unless it is reasonably sure that it has before it in the record all that took place in the trial court bearing upon the matter to be examined. Fragmentary records lacking any statement or stipulation therein or any certificate thereto that all trial proceedings pertinent to the claimed error are included leave the appellate court helpless to determine therefrom whether it has a complete record for the issues presented to it and therefore unable to declare error or lack of error. The duty to show error involves, as a necessary step therein, the obligation to bring up a sufficient record therefor, and, where appellant fails to do so, he has not sustained the burden of showing error."

The same rule is laid down in *Eddie v. Schumacher Wall Board Co.* decided in the District Court of Appeal, Second District, Division One, California, in 1926, cited at 249 Pac. 235. Indeed the appellee has been unable to find authority to the contrary on the proposition that the entire record must be before the court for the moving party to challenge the sufficiency of the evidence. In the case at bar, the

sufficiency of the evidence runs not only to the existence or non-existence of an oral agreement which was specifically found by the jury under the instructions of the court in the case at bar, but also as to the matter of performance, extreme hardship and change of position in reliance upon the agreement of employment between the parties litigant.

Since we would have to dispose of the matter of the sufficiency of the evidence before we could consider the matter of partial performance and estoppel in this regard, it should be called to the attention of the court that the lower court in its decree and judgment, expressly found that the plaintiff Stephenson surrendered his employment with Western Air Lines and his seniority therein, for what the plaintiff then and thereafter believed to be a contract of employment of the plaintiff by the defendant for a period of at least two years at a compensation of at least $1300.00 per month. The jury by its verdict on the plaintiff's first cause of action has necessarily determined that such a contract was made, and rendered verdict on the first cause of action accordingly. The law, as appellee believes, makes unnecessary any further consideration of the specific finding hereinabove recited for the reason that an appellate court will not interfere with the trial court's fact-findings on conflicting evidence.

Bradley v. Osborn, 194 Pac. (2d) 53, District Court of Appeal, Third District of California, 1948.

The main consideration then before this court is as to where the contract of employment was made and whether or not the said contract was removed from the statute of frauds.

Appellant contends that promissory estoppel is not recognized in the State of New York and that the contract is controlled by *rex loci contractus,* although appellant admits that the law of New York and the law of the Territory of Alaska, being the situs of the performance of the contract, are substantially the same.

In this connection appellee contends that promissory estoppel as such is a label applied to the end result rather than being a proposition of law itself, and that if the courts of New York arrive at the same conclusion, although they use not the phrase or label of promissory estoppel, that the result, whether the matter under consideration is decided under the laws of the State of New York or the Territory of Alaska, would be one and the same.

Appellee contends that the case at bar should be governed by the landmark California case decided in the Supreme Court of California in 1909, *Seymour v. Oelrichs, et al.,* 156 Cal. 782, 106 Pac. 88. It is the contention of the appellee that once it is established that a jurisdiction recognizes the doctrine of estoppel, regardless of whether that label is applied thereto, it is then merely a matter of squaring up the facts of a given situation with the formula of estoppel and the resulting decision follows as a matter of course.

It is interesting to note how closely the facts in the case at bar parallel those of the above mentioned *Seymour* case. The plaintiff in the *Seymour* case was Captain of Detectives in the police department of the City and County of San Francisco, at a salary of $250.00 per month. Under the law, he held practically a life position as Captain of Police, being removable therefrom only for good cause after trial. All of this was known to the defendants and to Charles L. Fair, to whose property the defendants had succeeded. Under these circumstances the defendants offered Seymour a position, wherein he was to render personal services in connection with their property in San Francisco for a compensation in money. The terms of the contract were finally agreed upon before Mr. Fair left for Europe, Mr. Fair acting for himself and Mr. Oelrichs representing the defendants. Plaintiff told them that he then had a life position, with a right to a pension if he remained long enough in the police department, and that he could not afford to leave the police department and go into anything else unless he was certain of steady employment, and they told him that they would give him a 10 year contract at $300.00 per month. This was asserted by plaintiff. The day before Mr. Fair left for Europe, to be absent a few weeks, being very busy in closing up certain business affairs that had to be attended to before he left, he told plaintiff:

> "Now in regard to this contract, you leave that stand until I get back, and I will give you the contract."

The facts were also made known to Mr. Oelrichs, who likewise gave his consent. This was on about June 1, 1902. The plaintiff relied absolutely upon the understanding that he was to have a written contract for ten years at $300.00 per month, and would not otherwise have resigned his position in the police department or entered the employ of the defendants and Fair. Fair was killed near Paris, France, on August 14, 1902, without having returned to America. Plaintiff continued to perform all services agreed to be rendered and received $300.00 a month therefor to July 1 of 1904, when the defendants, having determined to sell all of their San Francisco property, discharged all of their employees, including plaintiff, and did thereafter refuse to recognize Seymour as an employee.

The court, after setting forth the standards in almost the identical language cited in the appellant's case of *Federal Land Bank of Omaha v. Matson* (App. Br. 24) went on to say:

> "We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies 'in every transaction where the statute is invoked.' * * * (Citing cases) The vital principle is that he who has by his language or conduct *leads* another to do what he would not otherwise have done shall not subject such person to loss

or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both."

Klein v. Farmer, decided May 19, 1948, in the District Court of Appeal, First District, Division Two, California, cited at 194 Pac. (2d) 106, embracing a contract of employment as does the case at bar, is another case that comes clearly within the rule laid down in the *Seymour* case. The court in that case cited with approval and followed the rule of *Seymour v. Oelrichs.* In the *Klein* case the defendant had performed services for a period of seven years to an ailing person, since deceased, and had so changed her position that to deny her right to receive the stocks or the proceeds thereof would be to perpetrate a fraud since there had been an oral agreement with the deceased that if she stayed with him the stocks in question would be hers.

The *Seymour* case is cited with approval in *Columbia Pictures Corp. v. DeToth,* Supreme Court of California, 1945, cited at 161 Pac. (2d) 217. In this action the Columbia Pictures Corporation entered into an oral contract with the defendant to cover a period of employment of one year and the defendant, pleading the press of other business, continued the commencement of the term of employment for several weeks and actually obtained temporary employment from the plaintiff at an increased salary and later refused to sign the contract out of which this action

arose by way of declaratory judgment. It was an action by the Columbia Pictures Corporation against Andree DeToth for a declaration of rights and duties of the parties under an oral contract of employment. From a judgment of dismissal entered after a demurrer was sustained without leave to amend, plaintiffs appealed, and it was reversed. There was a four to two decision with the dissent by Spence. The court in the headnote stated:

> "If modification of oral employment contract entered into for one year, by postponement for a few weeks of commencement date and by temporary employment of employee in the interim, was induced by employee's fraudulent representations to the employer that he desired postponement because of other business commitments and by employee's promises to reduce terms of agreement thus modified to writing and abide by it, employee would be estopped under such circumstances to assert that the employment contract was void under the statute of frauds." (Cases cited at 161 Pac. (2d) 220.)

Viewing all of the evidence in the most favorable light to the plaintiff, the proof shows more than one element supporting removal of the subject contract from the statute of frauds, and the theory upon which it is removed is of little consequence.

Appellee calls attention to the *New York* case decided in 1929 titled *M. H. Metal Product Corp. v. April,* 167 N.E. 201, likewise involving Personal Property Law, Section 31, of New York. With Judge Cardozo presiding judge, the court clearly indicated

that a defendant would not be allowed to retain the fruits of fraud by the use of the statute. In that case the defendant guaranteed payment for jacks delivered to buyer corporation, of which defendant was a treasurer, and induced seller to change construction of jacks, consented to increase in price, and agreed to remain bound by his guarantee. The court held that defendant cannot now alter his position and avail himself of the Statute of Frauds (Personal Property Law Section 31) by asserting that defense on a contract of guaranty on the grounds that the alteration of the original written contract was not in writing. The New York Court in that case did not use the theory of promissory estoppel but arrived at the same conclusion as if the doctrine of estoppel had been applied.

In *Gorman v. Fried,* 35 N.Y. Supp. (2d) 441, the Court decided that in an action for installments due under a contract, defendant, by receiving and retaining the full consideration from plaintiff, namely the transfer of an automobile, was *estopped* (emphasis added) from asserting the statute of frauds as a defense. In the *Gorman* case at least the New York courts paid lip service to the doctrine of estoppel and the same result was achieved in the *M. H. Metal Products Corp. v. April* case, supra, without such lip service, but apparently on the proposition that the statutes could not be used as an engine of fraud.

Thus appellee contends that the label or theory of the court in arriving at a decision is of little moment

but it is only the end result which is of importance to the litigants.

Likewise in the *New York* case *In re Melia's Estate,* decided in 1950, 98 N.Y. Supp. (2d) 941, the court specifically held that the statute of frauds is a device designed to prevent—not to perpetuate fraud. There likewise the doctrine of promissory estoppel did not pass the lips of the court but the net result and the holding of the court would have been the same had said doctrine been invoked in name as well as in practice.

In *Weiss v. Weiss,* decided in 1944, 49 N.Y. Supp. (2d) 128, the Supreme Court further decided the matter that the statute of frauds could not be used as an engine for fraud and in that case Personal Property Law Section 31 was under consideration. The appellants, defendants below, had induced the appellee to cease negotiations for reorganization of his business and had promised to pay the sum of $50.00 per week for life to the appellee providing he would cease efforts to reorganize his business. The appellants had in fact secured control of the business and had purchased the mortgages and encumbrances on the business and had the same under control at the time the promise was given and accordingly the defense of the statute of frauds was not available. In other words, it would appear that the courts of New York subscribe to the proposition that it is the contents of the bottle—not the label thereon—that cures the patient.

In *Roberts, et al. v. Fulmer,* cited by appellant, 93 N.E. (2d) 846, 1950, in an action by alleged buyers for specific performance of an alleged oral contract to sell a farm, evidence, among other things, of extensive improvements by buyers, sustained determination of official referee, the late William F. Dowling, that contract was one of sale rather than tenancy and that there had been a part performance by the buyer which would take the case out of the statute of frauds. Real Property Law, Section 259, New York. This case lends weight to the analogous reasoning of the appellee in the instant litigation.

In appellee's treatment of the statute of frauds insofar as it bears upon the case under consideration, it is submitted that there are at least three different views or theories under which the statute of frauds can be unavailing to the party advancing the shield of its protection. In the first place, performance of the contract, either partial or in whole, will in some instances meet the requirements of the court in its deliberation; two, where a proposition for a contract to make and execute a certain agreement, the terms of which are specific and mutually understood, is in all respects as valid and obligatory, where no statutory objection is interposed, as the written contract itself would be if executed. The court expressed this reasoning and theory in *McLachlin v. Village of Whitehall,* 99 N.Y. Supp. 721, as taken from the case of *Pratt v. Hudson River Railroad Co.,* 21 N.Y. 305; and three, the doctrine which originally grew out of equity holding one estopped from relying upon the

statute of frauds where to do so will amount to the practice of fraud and this doctrine is not limited in its operation to any particular class of contract but applies in every transaction where the statute is invoked. *Seymour v. Oelrichs, et al.,* Supreme Court of California, 1909, 106 Pac. 88. The doctrine is closely akin to the reasoning that the law abhors a forfeiture and equity will not tolerate such.

That the oral agreement has been established is, as appellee contends, a foreclosed question for the reason herein stated that the sufficiency of the evidence is not reviewable in the absence of a record containing all of the evidence before the lower court. (See cases cited supra.)

That the appellee relied upon the agreement is borne out by the performance of the contract by the appellee and by his severance of his relationship with Western Air Lines, Inc.

The instructions of the court in this regard were ample and the court, pursuant to the verdict of the jury, has properly found in this respect. (R. 74.)

That the appellee suffered an irreparable loss or damage can hardly be disputed since the fruits of his labors with Western Air Lines, Inc. and the accumulation of over 20 years of seniority were lost by the actions of the appellant which resulted in the bringing of the present case. It would appear from the record that the appellee Stephenson acted as a reasonable and prudent man would act in discharging the higher affairs of life and the acts of Stephenson

in travelling from Anchorage to New York to settle a matter of great concern to him at the time stated, was an act of a magnitude that either did or should have put the appellant on notice that a day of decision was at hand.

So far as the doctrine of estoppel is concerned, it can be generally broken down into three groups. 1. By deed. 2. By matter of record. 3. By matters in pais, the last of which are also termed equitable estoppels. (See Bouvier's Law Dictionary unabridged, Vol. 1, 1941 edition, page 1078 through 1084.)

There is no question as to the attitude of the Alaska District Court in regard to estoppel in pais since that matter was decided in *Rasmuss v. Carey, et al.,* in 1947, cited at 11 Alaska Reporter 456. In a dispute arising over the working of a mining claim, the defense of the statute of frauds was interposed, citing section 4315, subsections 5 and 6, CLA 1933 (presently ACLA 1949 58-2-2) which sections made agreements void unless some written memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged or his lawful authorized agent, and the court held that:

> "Equity would not allow the statute of frauds to be used as a means of effecting the fraud it is designed to prevent."

And further that when, as in this case where the mining claim owner expended money, performed work, and permitted neighboring claim owners to use his land on strength of an oral agreement permitting

the claim owner to dump tailings on the neighboring claim as a reciprocal arrangement, neighboring claim owner was estopped from asserting the statute of frauds against the enforcement of the agreement.

In the United States Court of Appeals, Ninth Circuit, in *Union Packing Co. v. Cariboo Land and Cattle Co.,* September 24, 1951, rehearing denied on October 23, 1951, 191 Fed. (2d) 814, this court stated that the principle is well settled as set out in the leading case of *Seymour v. Oelrichs,* 156 Cal. 782, 106 Pac. 88. The *Union Packing Co.* case dealt with the proposition that where a packing company and cattle producer entered into an oral contract for the purchase and sale of livestock, and cattle company expended large sums of money in the course of executing the contract, even though the contract involved values in excess of $500.00 and was required to be in writing under California law, which was applicable to the transaction, expenditures of the cattle producer created an equitable estoppel against the application of the statute of frauds.

In *Holton v. Reed, et al.,* U. S. Court of Appeals, Tenth Circuit, decided December 13, 1951, 193 Fed. (2d) 391, the court said:

> "Where one party to an oral contract has, in reliance thereon, so far performed his part of the agreement that he would suffer an unjust or an unconscionable injury and loss if other party should be permitted to set up the statute of frauds as a defense, equity will regard such case as removed from the operation of statute and will enforce the contract by decreeing specific per-

formance of it or by granting other appropriate relief."

In the last above named case the defendant purchased stock in a bank, caused shares purchased to be distributed between himself and the plaintiff's husband so that each would own an equal number of shares and defendant signed joint notes with the plaintiff's husband to secure funds with which to purchase said stock for the purpose of obtaining control of a bank. Defendant and plaintiff's husband each agreed to acquire the shares of the other upon the death so as to maintain control in the bank. Plaintiff as executrix of her husband's estate, was estopped to assert the statute of frauds as a defense to the defendant's counter claim for specific performance of oral contract to convey stock upon the death of her husband.

On the question of estoppel see Section 808 Pomeroy's Equity Jurisprudence, Vol. 3, 5th edition:

> "* * * In fact, the more specific rules, the varying phases of opinions, and the partial conflict of decisions have arisen in actions at law rather than in equity. The treatment of the subject by courts of equity has generally been simple, uniform and consistent. The conduct creating the estoppel must be something which amounts either to a representation or a concealment of the existence of facts; and these facts must be material to the rights or interests of the parties affected by the representation or concealment, and who claim the benefit of the estoppel. The conduct may consist of external acts, or language written or spoken, or of silence. The facts represented

or concealed must, in general, be either existing or past, or at least represented to be so."

Section 808 b Promissory Estoppel:

"The general rule stated in the preceding section (808) that in order to furnish the basis of an estoppel, a representation or assurance must relate to some present or past fact or state of things, as distinguished from mere promises or expressions of opinion as to the future, must be qualified. There are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. (Citing the Seymour case at 156 Cal. 782; 106 Pac. 88). Thus an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice. The name 'promissory estoppel', has been adopted as indicating that the basis of the doctrine is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain situations. (Citing Fried v. Fisher, 328 Penn. 497; 196 Atl. 39; 115 A.L.R. 147). On the other hand, it has been said with good authority that the doctrine of promissory estoppel has been adopted as the equivalent of consideration, or substitute for consideration. (Williston on Contracts, Section 116, 139.) It is important to bear in mind that the doctrine is much older in its origin and application than the terminology now employed to describe it. Illustrative cases abound in the reports, especially since the formal embodiment

of the principle by the American Law Institute in the Restatement of the Law of Contracts, as follows:

'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.' Citing the Restatement of Contracts, page 110 at section 90."

Williston on Contracts, Vol. 1 revised edition 1936 at page 503, section 140, follows the above quoted section of the Restatement of Contracts with the following language:

"Although the Restatement does not use the term 'promissory estoppel', it here restates that doctrine in carefully formulated language."

After a careful review of the existing case law, appellee is forced to the conclusion that under the law of the State of New York, had the facts as presented in the *Seymour* case been decided in the New York jurisdiction, the decision would be one and the same even though the New York court would in all likelihood, as indicated by Williston, have refused to use the label promissory estoppel. As heretofore pointed out, it is the end result and not the label that counts.

We have already come to the conclusion that the New York courts arrive at the same position as those jurisdictions which admittedly apply the doctrine of

estoppel. A review of the authority of New York convinces the writer that the courts of New York have never squarely faced the issue here before the court. Appellant in its brief has called the attention of the court to cases involving the statute of frauds of the State of New York, South Dakota, California and other jurisdictions and urges the courts by analogy that these cases of other jurisdictions, including New York, do not recognize the doctrine of promissory estoppel in such cases as the one at bar.

Since as appellee believes, the New York courts have not met and decided the issue here confronting us, the appellee can only resort to analogous reasoning and based upon the cases cited herein is forced to the exact opposite conclusion of that arrived at by the appellant in its brief.

It is admitted that the law of New York and the law of the Territory of Alaska, insofar as the statute of frauds is concerned, is substantially the same. Appellee submits that it is pure speculation on the part of the appellant that the relief afforded by the lower court in the base at bar to the appellee is incompatible with the law of New York. The appellant recites that the New York Court of Appeals gives a clear answer as far as that court is concerned and in that connection cites *Roberts v. Fulmer,* 1950, 31 N.Y. 277; 93 N.E. (2d) 846 at 848. The appellant takes the dissenting opinion in that case as a somewhat more full restatement of the law, notwithstanding the fact that the majority opinion in the *Roberts v. Fulmer* case recognized the doctrine of estoppel in carefully

couched language. *Roberts v. Fulmer,* decided in 1950, is obvious proof that the State of New York recognizes in practice the doctrine of estoppel which has been in vogue in a majority of the states for the last half century.

Wikiosco v. Proller, decided in 1949, cited at 94 N.Y. Supp. (2d) 645, likewise cited in appellant's brief, stands for the proposition that the statute of frauds is a rule of evidence which is likewise the case in the Territory of Alaska. The Territory of Alaska sets forth in its code, Chapter 2, Volume 3, ACLA 1949 at section 58-2-2 under "Indispensable Evidence" herein cited supra, our so-called statute of frauds. Appellee is therefore led to the inescapable conclusion that the statute of frauds in the Territory of Alaska and likewise in the state of New York is procedural and accordingly the case presently being considered by the court would not be barred in either jurisdiction and the appellee, in order to answer the appellant, must only establish that the doctrine of estoppel is recognized in the jurisdiction of Alaska since the law of the forum controls the matter of evidence.

Support of this proposition is found in the American Law Institute, 1934 Restatement of the Law of Conflict of Law, page 702, section 585, as follows:

> "§585 WHAT LAW GOVERNS PROCEDURE.
>
> ALL MATTERS OF PROCEDURE ARE GOVERNED BY THE LAW OF THE FORUM.

Comment:

a. Matters of procedure include access to courts, the conditions of maintaining or barring action, the form of proceedings in court, the method of proving a claim, the method of dealing with foreign law, and proceedings after judgment. The rules covering these problems specifically are stated in subsequent sections in this chapter."

The appellee does not contend that the proposition hereinabove stated is without conflict or without exception but the subsequent sections referred to in the Restatement of the Law above quoted, at section 597 titled Evidence, is as follows:

"The law of the forum determines the admissibility of a particular piece of evidence."

It would, however, appear that since, as cited above, *Wikiosco v. Proller* stands for the proposition that the statute of frauds in the State of New York is a rule of evidence and therefore procedural, it would necessarily follow that the law of the forum controls and that the District Courts of Alaska recognize the doctrine of estoppel as set forth in *Rasmuss v. Carey,* supra.

Appellant in its brief recites that perhaps the most recent case in which equitable estoppel has been invoked to prevent a party to an oral agreement from relying upon the statute of frauds is *Federal Land Bank of Omaha v. Matson, et al.,* 1942, 68 So. Dak. 538; 3 N.W. (2d) 314. The appellee has no argument

with the decision laid down in the Supreme Court of South Dakota and submits that the rule so expounded is representative of the greater weight of authority within the United States. In that cause the action arose not out of a contract for personal services but on an alleged oral lease of real estate. The initial action was one of forcible entry and detainer by the Federal Land Bank of Omaha against W. L. Matson and others. From an adverse judgment the defendants appealed and the Supreme Court reversed the lower court because of erroneous instructions given by the trial court with the terse statement:

> "We deem it sufficient to suggest the theory of estoppel to the trial court."

The standards laid down in the *Federal Land Bank of Omaha* case were three, namely, (a) the oral agreement must be established by satisfactory evidence; (b) the party asserting rights under the agreement must have relied thereon and have indicated such reliance by acts unequivocally referable to the agreement, and (c) it must appear that because of the change in the position in reliance on the agreement, to enforce the statute will subject such a party to unconscionable hardship and loss.

Appellee submits that in the case at bar the three elements are amply supported by the evidence. The lower court, as herein recited, has specifically found, as has the jury, that a contract was in existence. There seems to be no question but that the appellee relied on the agreement and proceeded to perform

until the appellant made further performance impossible. Appellant has failed to state in any particular where the acts have not been unequivocally referable to the agreement and since the lower court has foreclosed the matter, it seems vain and useless to urge that point further on this court.

That the appellee has been subjected to an unconscionable hardship and loss seems so tolerably obvious from the record itself as to deserve little, if any, further argument. It was undisputed that Stephenson had accumulated valuable rights with Western Air Lines, Inc., that Marshall knew of those rights, that it had been explained to him that the rights would be lost if appellee did not return to Western Air Lines on or before March 18, 1951. (R. 128-129.) It would therefore appear that the case at bar meets the full measure of the test laid down in the *Federal Land Bank of Omaha v. Matson* case, cited as perhaps the most recent case even though the Territory of Alaska has a more recent case by five years.

In substance the instructions of the court in the *Federal Land Bank* case pointed out the controversy as to the terms of the oral agreement, advised that under SDC 10.0605 a lease for more than one year must be in writing, and that the question for the jury to decide was whether the defendant had a verbal agreement with the plaintiff to lease the 80 acres for 1941. To that portion of the instructions which dealt with the statute of frauds defendant excepted in the following words:

"The defendant excepts to instruction No. Two for the reason that the instruction is an instruction upon executory contract and that it does not include or instruct the jury as to the effect of performance, on the part of the defendants; that it does not instruct the jury that regardless of the fact that the lease may be oral and may be for more than one year, that if the contract is executed on the part of one of the parties that the same is a bona fide contract and without the statute of frauds regardless of the fact that it may be for more than one year."

Appellee feels constrained to call to the attention of the court that the performance by the appellee in the case at bar was full and complete so far as was allowed by the appellant and the appellee, up to and including the time of trial, was ready, willing and able to go forward with his burden thereunder.

At pages 24 and 25 of appellant's brief, the three-point formula was set out by Judge Smith of the Supreme Court of South Dakota. The doctrine of equitable estoppel, insofar as the State of South Dakota is concerned was undoubtedly founded or at least in some wise influenced by the landmark Minnesota case of *Dimond v. Manheim, et al.,* 61 Minn. 178; 63 N.W. Rep. 495, decided in 1895, which case was referred to in Judge Sickle's dissenting opinion in *Kraft v. Corson County,* 24 N.W. (2d) 643, decided in 1946. The *Dimond v. Manheim* case involved laches as the basis of estoppel. There the plaintiff for more than 20 years after the foreclosure of a mortgage,

invalid because of mistake of the registrar of deeds in recording the names of the assignee of the mortgage, stood idly by and thence came in to claim invalidity of the foreclosure sale after the property had been much improved and the statute of limitations had long run. Judge Sickle stated in part as follows (Quoting from the *Dimond* case, 63 N.W. Rep. at 497):

> "The authorities are, however, substantially all agreed upon the following general propositions: First. To create an estoppel, the conduct of the party need not consist of affirmative acts or words. It may consist of silence or a negative omission to act when it was his duty to speak or act. Second. It is not necessary that the facts must be actually known to a party estopped. It is enough if the circumstances are such that a knowledge of the truth is necessarily imputed to him. Third. It is not necessary that the conduct be done with a fraudulent intention to deceive, or with an actual intention that such conduct will be acted upon by the other party. It is enough that the conduct was done under such circumstances that he should have known that it was both natural and probable that it would be so acted upon."

Applying these general principles to the case at bar and considering not only the partial performance of the appellee but also the incurable and highly prejudicial change of circumstances visited upon the appellee, it seems reasonable and logical that the clearest case of equitable estoppel is established.

As urged by the appellant, *Albany Peanut Co. v. Euclid Candy Co. of Calif.*, First District, 1938, 30 Cal. App. (2d) 35; 85 Pac. (2d) 471, stands for the proposition that a mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel. However the court was not there confronted with a proposition such as in the case at bar. Had the court then and there been confronted with partial performance, actions on the part of the plaintiff in reliance on the contract and to its irreparable damage, together with silence or acquiescence on the part of the defendant in allowing the plaintiff to so act, the result would, without question, have been the same as the decision in the landmark *Seymour* case.

Hunter v. Sparling, State Superintendent of Banks, etc., District Court of Appeal, First District, Division One, California, 1948, cited at 197 Pac. (2d) 807, was an action by Robert Arnold Hunter against Maurice C. Sparling, State Superintendent of Banks and Liquidator of the Yokohama Specie Bank, Ltd., to recover balance due plaintiff for his retirement allowance. This case is another arising out of employment. Judgment for plaintiff and defendant appeals. The judgment was affirmed. Plaintiff had worked for the bank located in San Francisco from 1892 to 1941. His retirement benefits amounted to $40,835.00, of which he was paid $20,000.00 in November of 1941. The bank was thereafter transferred over to the Alien Property Division and this suit resulted for the re-

maining balance of some twenty odd thousand dollars. The evidence showed that the plaintiff had remained in the employment of the bank in question upon reliance of the employment benefits and retirement benefits and the court stated that under such circumstances the doctrine of promissory estoppel is applicable. The doctrine was well defined as follows in Section 90 of the Restatement of Contracts:

> "A promise which the promisor should reasonably expect to induce action of forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise."

In *Beverly Hills National Bank and Trust Co. v. Seres,* decided in 1946, 172 Pac. (2d) 894, District Court of Appeal, Second District, Division One, California, involving an oral lease or agreement to make a lease for a term and period of five years, the court reversed the decision of the lower court directing a verdict for the plaintiff and remanded the cause for a new trial. Cited with approval is the *Seymour* case which would allow the doctrine of equitable estoppel to be applied where the defendant had entered into possession and paid money, made substantial improvements and had in fact been promised a five year lease.

The case of *Kaye, et al. v. Melzer,* District Court of Appeal, First District, Division One, California, decided in August, 1948, cited at 197 Pac. (2d) 50,

is an action by William E. Kaye and Abe Miller against Max Melzer to recover damages for breach of an oral lease. From an adverse judgment and from an order denying defendant's motion for a new trial, the defendant appeals and the judgment was affirmed and the appeal dismissed. In that case each of the parties plaintiff had given up positions of employment in cities far removed from the situs of the leasehold property and had secured repeated assurances from the defendant that all was well and that they would secure a three year lease. The defendant had made such statements as:

> "Don't worry about it; everything is all right", * * *

and

> "You are worrying too much; open up and do business and everything is all right." * * *

The court in that case stated that there was no merit in the defendant's contention that the lower court erred in concluding that he was estopped to plead the statute of frauds.

> "Ever since the case of Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154, it has been the law in California that the equitable principle of estoppel applies to every case in which the statute of frauds is invoked."

Hayward v. Morrison, et al., Supreme Court of Oregon, 1952, 241 Pac. (2d) 888, was a suit for specific performance of an alleged oral contract for the sale and purchase of land by E. H. Hayward against

N. I. Morrison and wife. The Circuit Court, Linn County, Fred McHenry, J., entered a decree for specific performance and the defendant appealed.

> "The supreme court, Tooze, J., held that where everything done by the parties was directly referable to and induced by oral contract for sale and purchase of land, defendant was estopped from taking position inconsistent with her acts and conduct and from relying upon the statute of frauds."

The decree of the lower court was affirmed. Here the wife stood by for a period of about four years and watched the purchasers in possession make improvements and on one occasion advised the plaintiff that she didn't want to sign the deed now because she was angry with the defendant (her husband) over another deal that she wouldn't sign. Morrison and his wife were tenants by the entirety. In that case the wife listened to all of the oral transactions; there was no written contract, but some two or three years after the plaintiff went into possession, they did reduce to writing a memorandum of the remaining balance occasioned by the agreement of the defendants to make certain additional improvements on the property even though the plaintiff was in occupation and possession and was making improvements by his own right. Incidentally both parties paid taxes on the property although the plaintiff tendered the taxes back to the defendant. Now the statute involved made the agreement void, substantially the same as New York and Alaska.

"Under the statute of frauds an agreement for the sale of real property, or of any interest therein, is void, unless some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawful authorized agent. Section 2-909 (6) OCLA. Also is void an agreement concerning real property made by agent of the party sought to be charged unless the authority of the agent be in writing. Section 2-909 (7) OCLA."

The court stated:

"Under this statute, therefore, the agreement in this case is void as against the defendant Jane Morrison, unless under some well-recognized rule of law or equity, the case is taken out from under the operation of that law."

The court further stated and quoted Justice Latourette, in *Young v. Neill,* 190 Ore. 161, 166, 220 Pac. (2d) 89, 91, 225 Pac. (2d) 66:

"The statute of frauds was never designed to shield against the perpetration of fraud." * * *

"The foundation of this doctrine is fraud; not necessarily an antecedent or positive fraud, but a fraud inhering in the consequence of this setting up the statute. It applies where to permit the defense would be inequitable and unconscionable." Citing again Oregon authority together with the *Seymour* case. Citing likewise *Walter v. Hoffman,* 267 N.Y. 365, 196 N.E. 291, 101 A.L.R. 919, and note commencing at page 926; 37 C.J.S., Frauds, Statute of, section 247, page 753.

It is well established that the District of Alaska looks for guidance in interpretation to the jurisdiction of Oregon, that being the fountainhead of our codified law.

The third point in the appellant's specification of errors is that the plaintiff below made no effort to mitigate damages and therefore any recovery for other than nominal damages was improper. It is called to the attention of the court that the plaintiff in his complaint alleged some $22,100.00 damages or loss (R 7) by reason of the breach of the oral agreement, by way of loss of wages.

Appellee contends that the court properly instructed the jury in this regard (see instruction 7, R 312) and that the jury, in the proper discharge of its duty, took into account and consideration all items of mitigation and rendered verdict accordingly. It is at least undisputed that Stephenson could not have properly engaged himself in the services of another air carrier without peril of violation of Civil Aeronautics Act in regard to dual employment or connections with competing air carriers (R 210).

The matter of duty of mitigation is not a highly controversial field of law and is properly set forth in 15 *Am. Jur.,* at Section 31, page 428, as follows:

> "§31. Duty to Enter Into Other Contracts—Duty to Seek Other Employment. The rule requiring a party injured by the breach of a contract to make reasonable efforts and exercise reasonable diligence to reduce or minimize the

resulting damages as much as is practicable may, in some circumstances, impose upon him the duty of entering into other contracts. To what extent it is his duty to protect himself from loss by seeking another contract of like character depends on the nature of the contract broken. On the breach of a contract of employment calling for personal services by the wrongful discharge of the employee, the latter is required to use reasonable efforts to obtain other employment of like nature for the purpose of lessening his damages. He should make such efforts as the average individual, desiring employment, would make at that particular time and place. Ultimately, the question of reasonable diligence is one for the jury's determination under all of the facts and circumstances of the case." * * *

It is worthy of note that Stephenson was not a person who rendered ordinary services but his profession was a highly skilled classification which would normally descend upon air pilots and other employees of an air carrier who had long sustained services within the organization and that with a new or embryonic operation such as the Alaska Airlines might well be classified, its existence was not of such duration so as the corporation would have mothered its own brood of executive officers. It is reasonable then to assume that they would have to go in the open market, so to speak, purchase their talent and pay the premium. This they did and the wisdom of their judgment is reflected in the granting of certification

shortly after Mr. Stephenson entered into the performance of the agreement of employment.

Appellant would have us believe that Mr. Stephenson, although he has cut his bridges behind him, could go into the air carriers' industry and minimize his damages more or less at a moment's notice. It is submitted that this peculiar type of employment deserves a different consideration than would be afforded to a salesman, a laborer, a carpenter or a non-skilled individual.

As stated in *Am. Jur.,* Volume 15, Section 33, page 431:

> "§33. Character of Employment Which Must Be Sought or Accepted. As a general rule, an employee who is wrongfully discharged before the termination of his contract of employment is not obliged to seek or to accept other employment of a different or inferior kind in order to mitigate the damages." * * *

It would therefore appear that the jury was properly instructed and that the matter of mitigation and the duty of the appellee to search for other employment was properly considered and disposed of by the verdict rendered in the lower court.

In regard to the fourth point raised by appellant in its brief, at page 28, the appellee submits that the only evidence in the record touching or concerning the matter of the rental of a dwelling by the appellee during his employment with Alaska Airlines and while stationed in Anchorage, is contained in the

record at pages 214 through 218. Nowhere in the record is there any evidence that the appellee was in fact purchasing a home instead of renting a home, except such inferential evidence as may be gleaned from counsel's leading questions. It appears that the testimony of A. W. Stephenson in that portion of the record recited is as susceptible to a lease option agreement as it is to a purchase contract unless we treat appellant's counsel's questions as evidence:

> "Q. But it is a fact that if you sold the home for at least as much as your purchase price, you would get all that rental back, wouldn't you?
>
> A. If I was fortunate enough to do a thing like that."

In view of the state of the record, it is again contended by the appellee that appellant's fourth specification of error is a matter that deals with the sufficiency of the evidence which, as appellee contends, is not reviewable unless all of the evidence is embraced in the record, which is not true in the present case. To conclude otherwise would be to put the burden on the appellate court of searching the transcript to supply the deficiency of the record, which practice is not in accord with the well established rule hereinbefore recited, since the obligation of sufficient record rests upon the appellant alone.

By reason of the authority hereinabove recited in regard to the main contentions of the appellant, there is no justification or reason for this court to now and here concern itself with an unsettled proposition

of law insofar as the State of New York is concerned. In view of the fact that the authorities unanimously agree that each case involving estoppel must be decided on its own facts, accordingly the verdict and judgment of the lower court should be affirmed.

Dated, Anchorage, Alaska,
April 1, 1953.

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